

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 860 of 2015**

- Hari Khandelwal S/o Shri Bholaram Khandelwal Aged About 35 Years R/o Mig/56, Near Bus Stand, Housing Board Colony, Tatibandh, Raipur, Tahsil And Civil And Rev. Distt. Raipur Chhattisgarh.

---- Petitioner**Versus**

1. Arun Nashine S/o Shri P.K. Nashine Aged About 47 Years R/o HIG-459 Sector-1, D.D. Nagar, Raipur, Distt. Raipur Chhattisgarh.
2. State Of Chhattisgarh Through The Collector, Raipur, Distt. Raipur Chhattisgarh.

---- Respondents

For Petitioner	Mr. Awadh Tripathi, Advocate
For Respondent No.1	Mr. A.K. Prasad, Advocate
For State	Mr. Ashish Shukla, Government Advocate

SB: Hon'ble Shri Justice P.Sam Koshy**Order On Board****10.01.2017**

1. The present Petition under Section 482 Cr.P.C. has been filed seeking for quashment of the order dated 10.09.2015 passed by the 8th Additional Sessions Judge, Raipur in Criminal Revision No. 19/15.
2. The brief facts leading to the passing of the impugned order under challenge in the present Cr.M.P. is that the Respondent No.1 initiated Criminal prosecution against the present Petitioner in respect of the dishonouring of the cheque on the ground of insufficient fund under Section 138 of the Negotiable Instrument Act. The said case was

registered before the Court of Judicial Magistrate First Class, Raipur on 22.08.2008. The charges against the Petitioner were framed on 19.12.2008. After the evidence of the complainant side and closing the evidence on behalf of the complainant the statement of accused was recorded on 29.03.2011 and the chance for leading defence witnesses was awarded to the accused person. On 09.09.2011 the Petitioner accused had filed application under Section 311 of the Cr.P.C. seeking for the issuance of the summons to material witnesses. The said application was rejected by the Trial Court on 04.11.2011. On the same day the Petitioner accused also submitted list of witnesses to be examined on behalf of the defence. The said list named Dr. Sunanda Dhenge, hand writing expert and authorised officer of Income Tax department Dr. S.K. Kelkar to be called upon as witnesses in defence which was accepted by the Trial Court. Again on 06.11.2012 the Petitioner accused filed another application under Section 91 of the Cr.P.C. calling for details like PAN Number, Income Tax Return from the officer be free whom the income tax return has been deposited by the Respondent complainant and also sought for summoning of the hand writing expert's opinion in respect of the date which has been mentioned in the cheque involved in the present dispute. According to the Petitioner there seems to be a clear tampering of the date in the cheque. The said application was rejected on 23.02.2012 by the Trial Court. Later on, on 13.03.2012 another application was filed by the Petitioner accused under Section 45 of the Evidence Act seeking for opinion of the expert in the instant case so far as whether there has been any tampering of the date on

the cheque or not. The said application was rejected by the Trial Court on 02.05.2012.

3. The order dated 02.05.2012 rejecting the application under Section 45 was put to challenge by the Petitioner accused before the Revisional Court and the Revisional Court vide the order dated 28.09.2012 rejected the Criminal Revision. Against the said order of rejection by the Revisional Court dated 28.09.2012 the Petitioner accused had preferred Petition before the High court under Section 482 of the Cr.P.C. and the High Court upholding the order of the trial Court as well as the Revisional Court rejected the Petition vide order dated 01.08.2013. After a lapse of about 1 year on 03.07.2014 the present Petitioner accused again filed two applications one under Section 311 seeking for permission for the Petitioner Accused to be himself examined as witness which was allowed by the Court. At the same time another application under Section 91 again was preferred by the Petitioner accused seeking permission to take on record the opinion of the hand writing expert Dr. Sunanda Dhenge. This application was allowed by the Court below vide its order dated 16.12.2014. This order dated 16.12.2014 to the extent of the allowing of the application under Section 91 Cr.P.C. was put to challenge by way of Criminal Revision preferred by the Complainant Respondent which was registered as Criminal Revision No. 19/2015 alleging that the Court below could not have permitted the taking on record the opinion of hand writing expert as the same has already been adjudicated upon in an earlier proceeding drawn in the present case itself.

4. The Revisional Court allowed the Revision preferred by the complainant Respondent vide its order dated 10.09.2015 holding that the order of the Magistrate allowing the application under Section 91 is not proper as the same was adjudicated upon by the Trial Court on an earlier occasion vide its order dated 02.05.2012 and which stood affirmed by the Revisional Court as well as by the High Court in Petition under Section 482 of the Cr.P.C. It is this order which has been questioned by the Petitioner accused in the present Petition.
5. Learned Counsel for the Petitioner submits that the fact that the Application under Section 45 of the Evidence Act has already been adjudicated upon by the Trial Court would not preclude the Petitioner accused from availing other remedies available under the Cr.P.C.. According to the Counsel for the Petitioner accused the stages at which the two applications have been filed are entirely different and therefore it would not be hit by the earlier adjudication.
6. Shri. Awadh Triapathi, Counsel for the Petitioner submits that the present application under Section 91 was moved after obtaining hand writing experts opinion, the document which was not in existence when initially application under Section 45 was filed and therefore in all fairness subsequent application was tenable.
7. Learned Counsel for the Petitoiner further submits that the Petitioner accused in the instant case had at his instance submitted names of three witnesses of which one was the name of the hand writing expert from whom the Petitioner has obtained the opinion.
8. According to the Petitioner when the first application under Section 45 was moved the request was for asking the Court to summon the

hand writing expert to give her report in respect of the cheque in dispute. However vide section 91 of the Cr.P.C. the Petitioner accused have sought for taking the hand writing expert's opinion on record which the Petitoiner has already obtained from the expert and therefore just because the earlier application under Section 45 has been rejected can not be a ground for denying the Petitioner's right available to him in support of his defence. Thus has challenged the order of the Revisional Court and prayed for its' quashment.

9. It was also contended by the Petitioner that two applications i.e. first application which got rejected under Section 45 of the Evidence Act and the subsequent application under Section 91 of the Cr.P.C. were filed at two different stages and therefore also the Revisional Court could not have interfered with the order of the Trial Court allowing of the application under Section 91 of the Cr.P.C. According to the Petitioner the Application under Section 45 of the Evidence Act was invoked at the stage when the evidence of the defence had not started and at that point of time i.e. the expert's opinion was not in his possession. However, Section 91 of the Cr.P.C. has been invoked at the stage of defence witness and was also being invoked after the expert's opinion was obtained by the Petitioner accused. According to the Petitoiner the application under Section 91 of the Cr.P.C. was invoked as a right of defence. It was the defence of the Petitioner accused that there was tampering made by the complainant so far as the date that has been put on the cheque. To establish the said tampering on the cheque it was necessary to obtain the hand writing expert's opinion. The Petitioner in the instant

case has now obtained the expert's opinion. The Court on an earlier occasion has allowed the application of the Petitioner accused calling upon the hand writing expert as witness and when the said witness goes to the Court it was necessary for that expert to have his opinion on record so as to substantiate his deposition before the trial Court and it was in the said factual background that the application under Section 91 was allowed by the Trial Court and there was no scope of interference and therefore the order passed by the Revisional Court is bad in law.

10. The Respondent No. 1, the complainant opposing the Petition submits that the order of the Revisional Court does not warrant any interference as the same has been passed purely in accordance with the legal position as it stands. According to the Respondent No.1 it is the case where the request that was sought under Section 91 of the Cr.P.C. was the same with that was sought under Section 45 of the Evidence Act earlier and which stood rejected. Therefore it would amount to Trial Court reviewing its earlier order rejecting the application under Section 45 of the Evidence Act and for this reason the Revision preferred by Respondent No. 1 was allowed. According to Respondent No.1 allowing of the application under Section 91 by the Trial Court literally amounts to reconsidering its earlier order passed by the Trial Court while rejecting application under Section 45 of the Evidence Act which would be detrimental to the interest of the Respondent No.1.
11. According to the Respondent No.1 the Revisional Court also took into consideration the fact that the rejection of the application under

Section 45 of the Evidence Act was for the same relief which is now being sought under Section 91 of the Cr.P.C. which already stood affirmed by the Revisional Court and also by the High Court in a Petition under Section 482 Cr.P.C. Thus the same has attained finality and now entertaining the application under Section 91 which is allowed would amount to undoing orders passed by the Trial Court which was upheld by the Revisional Court as well as by the High Court which otherwise would be impermissible under law. The impugned order of the Revisional Court thus was proper, legal and justified and the present Petition deserves to be rejected on this ground.

12. Having considered the rival contentions put forth on either side and on perusal of the record some of the undisputed dates involved in the present case are that the complaint under Section 138 of the Negotiable Instrument Act was filed by the Respondent No.1 on 22.08.2008. The charges were framed against the Petitioner accused on 19.12.2008. In course of time the complainant's evidence was concluded. Thereafter, the matter was fixed for defence evidence since 29.03.2011 onwards. On 09.09.2011 an application under Section 311 was filed for the issuance of the summons to material witnesses which was rejected by the Trial Court on 04.01.2011. On 06.01.2012 the Petitioner moved another application under Section 91 of the Cr.P.C. seeking for direction to call for the income tax details of the complainant and also for summoning the hand writing expert's opinion in respect of the date which was mentioned in the cheque. The said application stood

rejected on 23.02.2012. Immediately thereafter the Petitioner moved an application under Section 45 of the Evidence Act seeking for expert's opinion in respect of allegation of tampering of date on the cheque. The said application also stood rejected on 02.05.2012. The order dated 02.05.2012 was subjected to challenge in the Revision Petition which stood rejected on 28.09.2012. Subsequently a Petition under Section 482 of the Cr.P.C. was filed against the order of rejection of the Application under Section 45 as well as the rejection of the revision before this High Court which also stood rejected on 01.08.2013. It is thereafter that the two applications were filed on 03.07.2014 one under Section 315 which was allowed and one under Section 91 which too was allowed vide order dated 16.12.2014. Against which a Revision Petition was preferred by the complainant and the Revisional Court allowed the Revision vide order dated 10.09.2015 leading to the filing of the present Cr.M.P.

13. If we look into the contents of the application under Section 91 which is under dispute it would be evidently clear that the demand in the said application was similar in nature as was made in the application under Section 91 of the Cr.P.C. moved initially on 06.01.2012 and subsequently again on 13.03.2012 under Section 45 of the Evidence Act. What is also reflected from the different applications under different provisions of law moved by the Petitioner is the fact that what was not permitted under one provision was sought to be obtained under another provision of law.

14. Another factor which can not be brushed aside is that each application when it was being moved did not disclose the fact that

the Petitioner had already sought for similar relief under different provision of law and which already stood rejected.

15. Another vital factor and an admitted position in the case so far as the Petitioner is concerned is in respect of issuance of cheque to the Respondent No.1 complainant and also the fact that the signature on the said cheque is that of the Petitioner. In addition, dishonouring of the cheque for want of sufficient fund is also not in dispute. These are some of the necessary ingredients with which offence under Section 138 is made out. Thus the Court below i.e. the Trial Court reached to the conclusion that so far as for deciding the case under Section 138 of the N.I. Act opinion of the hand writing expert so far as the date is concerned may not have been so vital a factor for which the application deserves to be allowed.

16. It is also relevant to mention at this juncture that when the Application under Section 45 of the Evidence Act was rejected and which stood affirmed by the Revisional Court i.e. the Sessions Court and also by the High court in a Petition under Section 482 of the Cr.P.C. and the Petitioner having not challenged the said order the findings of the Court in this regard had attained finality. Therefore the requirement of the opinion of the hand writing expert stood adjudicated upon vide the said application and for the same relief under a different provision of law another application could not have been filed. It would literally amount to reviewing / reconsidering its earlier order which has already been affirmed by two of the higher Courts.

17. True it is that an accused person has every right to take all the

defence that is available under provisions of law but it does not certainly mean that the Petitioner or for that matter the accused can for same cause of action or for the same nature of relief can keep on moving applications under different provisions of law in the same proceeding which in the opinion of this Court would amount to misuse of process of Court. There is clear suppression of the material facts by the Petitioner when he had moved subsequent application under Section 91 of the Cr.P.C. Another fact which is pertinent at this juncture to refer is the fact that the Bank authorities have not refused to accept the cheque or processing the cheque on account of there being over writing or tampering of date but it was specifically on the ground of insufficient fund thus the relevancy of the hand writing expert at this juncture would not be of much importance.

18. In addition from the order of the Revisional Court it also reveals that right from March 2011 the matter is being fixed for defence evidence till the order was passed on 16.12.2014 but the defence did not adduce any evidence which also forces this Court to draw an inference that these repeated applications are being moved by the Petitioner as delaying tactics which has also been opined by the Revisional Court. The conduct of the Petitioner seems to be not fair as when on earlier occasion he had moved an application calling for witnesses he could have reflected his name in the said application as witness which he did not do at that stage and has done after more than 3 years when the matter has been listed for defence evidence.
19. Thus for all the aforesaid reasons this Court is of the opinion that the

order of the Revisional Court is not in any manner infirm or illegal or beyond its jurisdiction calling for interference. The present Petition thus deserves to be rejected.

20. Further, taking into consideration the fact that the case is of the year 2008, it is expected that the Trial Court shall proceed immediately with the matter and shall try and conclude the proceeding as early as possible preferably within a period of 6 months from the date of receipt of copy of this order.

21. With the aforesaid observations the present Cr.M.P. stands rejected.

22. The Interim relief earlier granted also stands vacated and merged with the final order.

Sd/-

(P. Sam Koshy)
JUDGE